No. 95-2000

(2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

SCOTT D. LEVINE, M.D.,

Petitioner,

vs.

CENTRAL FLORIDA MEDICAL AFFILIATES, INC.; HEALTHCHOICE, INC.; SAND LAKE HOSPITAL; ORLANDO REGIONAL HEALTHCARE SYSTEM, INC. f/k/a ORLANDO REGIONAL MEDICAL CENTER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CENTRAL FLORIDA MEDICAL AFFILIATES, INC.

RONALD M. SCHIRTZER
Counsel of Record
ROBERT J. ENDERS
MARK J. WAXMAN
FOLEY & LARDNER
Attorneys for Respondent Central Florida Medical Affiliates, Inc.
111 North Orange Avenue
Suite 1800
P.O. Box 2193
Orlando, Florida 32802-2193
(407) 423-7656

9384
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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LIST OF INTERESTED PARTIES

The Petitioner is Scott D. Levine, M.D., an individual. The Petitioner was the plaintiff in the district court, and the appellant before the Eleventh Circuit.

The caption of this case properly contains the name of all parties to this action. Respondent Central Florida Medical Affiliates, Inc. is a Florida corporation with no parent corporations or non-wholly owned subsidiaries. Central Florida Medical Affiliates, Inc. was a defendant in the district court, and an appellee before the Eleventh Circuit.

Respondent Health*choice* is a Florida for-profit corporation. It is a wholly owned subsidiary of Healthnet Services, Inc., a wholly owned for-profit subsidiary of Respondent Orlando Regional Healthcare System, Inc., f/k/a Orlando Regional Medical Center. Health*choice*, Inc. has no non-wholly owned subsidiaries. Health*choice*, Inc. was a defendant in the district court, and an appellee before the Eleventh Circuit.

Respondent Orlando Regional Healthcare System, Inc., f/k/a Orlando Regional Medical Center is a Florida non-profit corporation. Orlando Regional Healthcare System, Inc. has no parent corporation, and no non-wholly owned subsidiaries. Orlando Regional Healthcare System, Inc. was a defendant in the district court, and an appellee before the Eleventh Circuit.

Respondent Sand Lake Hospital is a licensed hospital in the State of Florida, which is owned by Orlando Regional Healthcare System, Inc. Sand Lake Hospital has no wholly owned subsidiaries. Sand Lake Hospital was a defendant in the district court, and an appellee before the Eleventh Circuit.

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PRELIMINARY STATEMENT

Petitioner Scott D. Levine,, M.D. seeks certiorari review of the decision of the Eleventh Circuit upholding the district court's award of summary judgment to the Respondents, including Central Florida Medical Affiliates, Inc. ("CFMA"). *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538 (11th Cir. 1996). The Petitioner contends that it was error for the Eleventh Circuit to refuse to afford per se treatment to the Petitioner's claims under Section One of the Sherman Act, and that "confusion" exists regarding this Court's allegedly inconsistent prior rulings regarding the application of per se treatment for alleged antitrust violations.

Under Rule 10, Rules of the Supreme Court, review on writ of certiorari is not a matter of right, but of judicial discretion. Rule 10 specifically indicates that a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings, or the misapplication of a properly stated rule of law.

Recognizing the unlikelihood of a grant of certiorari review based upon an allegedly erroneous factual finding, the Petitioner alleges the Eleventh Circuit opinion conflicts with relevant decisions of this Court, and conflicts with decisions of other United States courts of appeal. To create the appearance of a question of law rather than a question of fact, in the questions presented in his petition, the Petitioner asks this Court to review the ruling of the Eleventh Circuit based on the premise that he has presented evidence of (1) a horizontal boycott of competitors which limits competition and consumer choice; and (2) a combination of competitors, through a professional association, that promotes and secures adherence to a fee schedule.

CFMA respectfully objects to Petitioner's statement of the

questions presented to this Court because, as evidenced in the opinions of both the district court and the Eleventh Circuit, the record below, treated in the light most favorable to the Petitioner, does not support the stated factual premises. The only "confusion" in this action comes from the Petitioner's false assumptions regarding the evidence presented to the district court and the Eleventh Circuit. Once that "confusion" is cleared up, it is readily apparent that the Eleventh Circuit properly followed a long and consistent line of legal precedent from this Court in denying the Petitioner's request for per se treatment of his antitrust claims, and upholding the district court's award of summary judgment to the Respondents.

In light of the erroneous premises in the questions presented by the Petitioner, CFMA offers the following restatement of the question to be presented to this Court for consideration of Petitioner's writ of certiorari:

1. Did the Eleventh Circuit, based upon the facts actually presented by the Petitioner to the district court, properly apply the appropriate legal standards of antitrust law in upholding the district court's grant of summary judgment to the Respondents?

In evaluating a case on summary judgment, where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial, and summary judgment is properly awarded to the non-moving party. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). As will be demonstrated below, both the district court and the Eleventh Circuit determined that the Petitioner failed to demonstrate collusive behavior by the Respondents that had any anticompetitive effect, and also failed to demonstrate any antitrust injury, despite ample opportunity to do so. The

purported error by the Eleventh Circuit is therefore not a failure to follow established principles of law, but rather alleged erroneous factual determinations based upon the record. Petitioner's request for certiorari review should accordingly be denied in accordance with the guidelines of Rule 10.

STATEMENT OF THE CASE

This case arises out of the denial of the Petitioner's request to participate in a preferred provider organization ("PPO") operated by Respondent Health*choice*, Inc. ("Health*choice*"). Like the majority of other PPOs and health maintenance organizations ("HMOs") in the Orlando area, Health*choice* utilizes a closed panel, which means that participation is not available to all qualified interested physicians or other providers. Closed panels permit PPOs to exercise greater control over physicians through utilization review, and customers of Health*choice* desire and often demand utilization of closed panels by PPOs and HMOs. [R3-80, ¶¶ 5-9; R3-81, ¶¶ 5-8; R3-76, ¶¶ 6 and 7.]

The record below indicates a dynamic and changing market for the purchase and sale of health care services. At the time summary judgment was granted to the Respondents by the District court, Health*choice* was one of thirty-eight (38) PPOs operating in the Orlando area. There were also eleven (11) HMOs and a vast array of traditional comprehensive insurance coverage companies ("TCICs") operating in the Orlando area as of the date summary judgment was granted. [R3-80, Exh. A.] PPOs, HMOs, and TCICs all compete against one another to provide comprehensive medical group coverage to employers, insurance companies, third party administrators, and government agencies (hereinafter collectively referred to as "Payors"). Individuals whose health care services are provided through Health*choice* represent less than a 6% share of the potential patients in the Orlando area. [R3-80, ¶ 18.]

Healthchoice, like other PPOs, enters into bilateral contracts with a limited number of healthcare providers, including physicians, hospitals, pharmacies, and durable medical equipment companies. Healthchoice then markets its panel of providers to interested Payors. Healthchoice negotiates with individual Payors the maximum allowable prices for services rendered or products furnished by panel members to enrollees of those Payors. After specific fees for a Payor are negotiated and agreed to by Healthchoice, panel members are given the option of providing services or products for no more than the negotiated price, or opting out of the panel for a particular Payor. [R4-110, Tab 40 at 100206-207.]

Healthchoice is a wholly owned for-profit subsidiary, two tiers removed, of Respondent Orlando Regional Healthcare Systems, Inc., f/k/a Orlando Regional Medical Center ("ORHS"). CFMA is a for-profit corporation owned and controlled by physicians who participate in Healthchoice. CFMA primarily acts as a physician advocacy group in non-price related matters such as the scope and nature of utilization review. [R3-80, ¶ 10.]

CFMA does not determine which physicians will be invited to participate in the Healthchoice panel. That decision is made by Healthchoice non-physician staff members. [R3-80, ¶ 10; *Levine*, 72 F.3d at 1547.] As noted by the Eleventh Circuit, CFMA members, including the four physicians who are on the board of directors of Healthchoice, are excluded from participating in the establishment of the maximum fee schedule used by Healthchoice, or the negotiation of prices for medical services between Healthchoice and employers, insurers, and other Payors. *Levine*, 72 F.3d at 1546. While participation in Healthchoice is a prerequisite for membership in CFMA, participating Healthchoice physicians do not have to be members of CFMA, and many are not. *Id.* at 1547.

As of the date summary judgment was granted by the District court, there were approximately 2,200 licensed physicians in the Orlando area, and more than 400 internists who participated in PPOs and HMOs, including the Petitioner, who is a panel member of two PPOs that compete with Health*choice*. The Health*choice* panel included 863 physicians and 80 internists as of the date summary judgment was granted. [R3-49, ¶ 15; R3-80, ¶ 16.] The denial of the Petitioner's request to participate in the Health*choice* panel had no adverse impact on his ability to compete in the Orlando area. In 1990, his first full year of practice after moving to the Orlando area in 1989, the Petitioner had a pre-tax net income of $553,176. In 1991, his pre-tax net income rose to $724,722, an increase of 31%. [R2-52, pg. 72.] In comparison, the average pre-tax net income of self-employed Florida internists in an American Medical Association study was $191,200 in 1992. [R2-49, ¶ 37.]

In addition to the improper premises discussed above, the Petitioner has made several misstatements of fact in his petition. The following three examples reflect erroneous statements of fact contained in the Petition:

1. In an effort to imply collusion, the Petitioner states that CFMA is privately owned by the same hospital which owns Health*choice*. [Pg. 22.] This is patently false. CFMA is owned by its physician members, as recognized by the Petitioner in his identification of the Parties to the Proceeding in his petition. [Pg. ii.]

2. In an effort to demonstrate anticompetitive effect and intent, the Petitioner states that CFMA doctors are prohibited from participating in any plan for a prospective Health*choice* Payor who has declined to do business with Health*choice*. [Pg. 5.] This is again false. Physicians are free to join other PPOs and HMOs, and most physicians on the Health*choice* panel are

members of several competing panels. [R2-49, ¶ 15; R3-80, ¶ 21.] The cited six (6) month restriction only applies to a former Health*choice* Payor that seeks to bypass utilization of Health*choice* by forming its own PPO provider panel. [R4-110, tab 32, 100026-27.]

3. In a further effort to demonstrate anticompetitive effect, the Petitioner contends that the fees paid to CFMA members were stable, uniform, and trending upward during a four-year period. [Pg. 21.] Yet, as noted by the Eleventh Circuit, there was no evidence presented by the Petitioner demonstrating that prices for services of Health*choice* physicians charged to Payors increased, and absolutely no evidence of how fees for Health*choice* physicians compare with those of non-Health*choice* physicians. *Levine*, 72 F.3d at 1553.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONER FAILED TO ESTABLISH ANY FACTUAL BASIS FOR AN ALLEGED HORIZONTAL GROUP BOYCOTT FOR WHICH PER SE TREATMENT CAN BE AFFORDED UNDER THE ANTITRUST LAWS.

A. There Is No "Confusion" Regarding the Circumstances When the Per Se Rule Can Be Invoked.

The Petitioner alleges that it is necessary for this Court to clear up "confusion" regarding the treatment of horizontal group boycotts under the antitrust laws. Pg. 12. There is no confusion in the prior opinions of the this Court cited by the Petitioner, nor was the Eleventh Circuit "confused" in its refusal to grant per se treatment to the Petitioner's claims in this case.

This Court has clearly and unequivocally addressed the standards for application of per se treatment to alleged antitrust violations. Per se treatment is limited to those situations where:

> the challenged action falls into the category of agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985), (citing *Northern Pacific Railroad Co. v. United States*, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)).

Thus, before per se treatment is afforded, a plaintiff must demonstrate that the challenged activity is one that has a clear and apparent anticompetitive effect and no redeeming virtue. Demonstrating clear and apparent anticompetitive effect is not, as the Petitioner contends, a change of direction by this Court first evidenced in *Northwest Wholesale Stationers*. Preliminary review of the challenged activity to determine whether the per se or rule of reason approach should be applied in a particular case has been utilized by this Court since *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

The Petitioner has attempted to overcome the hurdles of demonstrating clear anticompetitive effect by invoking the mantra of "per se illegal group boycott," and citing to other cases in which this Court has afforded per se treatment to "group boycotts." In doing so, the Petitioner has ignored the prior

warnings of this Court against efforts to obtain per se treatment by pigeon-holing an activity into the broad category of "group boycott" without demonstrating that it is a naked restraint of trade with no purpose except stifling competition. *White Motor Co. v. United States*; 372 U.S. 253, 263, 83 S. Ct. 696, 702, 9 L. Ed. 2d 738 (1963); *Northwest Wholesale Stationers*, 472 U.S. at 298; *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 458, 106 S. Ct. 2009, 2018, 90 L. Ed. 2d 445 (1986).

B. The Petitioner Failed to Demonstrate Any Evidence of Requisite Horizontal Collusive Behavior Necessary to Establish a Group Boycott Claim Subject to the Per Se Illegal Rubric Under Section One of the Sherman Act.

The Petitioner failed to produce any evidence of a concerted refusal to deal involving agreement among the Petitioner's competitors. The evidence on record is undisputed that Health*choice*'s staff, not CFMA or the CFMA members of Health*choice*'s board of directors, make the decisions regarding which physicians will be invited to participate in Health*choice*'s panel. *Levine*, 72 F.3d at 1547.

Thus, despite Petitioner's claims to the contrary, the denial of participation in Health*choice* does not fall into the category of horizontal group boycotts deemed per se illegal by this Court in *Associated Press v. United States*, 326 U.S. 1, 65 S. Ct 1416, 89 L. Ed. 2013 (1944), *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959), *United States v. General Motors Corp.*, 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966), and *F.T.C. v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990). Neither does the Eleventh Circuit's decision represent a deviation from the standard analysis utilized by courts to review antitrust claims. In each of the cases cited above, this Court determined whether the plaintiffs were able to demonstrate collusive activity

that had a clear and apparent anticompetitive effect before affording per se treatment.

In *Associated Press*, the plaintiff demonstrated that Associated Press was the largest news agency in the United States, and that exclusion from membership in the organization placed the plaintiff at a significant competitive disadvantage. 326 U.S. at 17-18. The Associated Press bylaws, established and controlled by existing Associated Press members, placed restrictions on new members who competed with existing members (including payment of significant fees and other onerous conditions) that were not imposed on new members who did not compete with existing members. Because of the clear impact on competition, and obvious anticompetitive and discriminatory treatment of new members who competed with existing members, this Court determined that the adoption and enforcement of the bylaws by Associated Press members constituted collusive behavior that was a per se antitrust violation. *Id.* at 18-19.

In *Klor's, Inc.*, the plaintiff was able to demonstrate that one of its direct competitors convinced various manufacturers and distributors of electrical appliances to refuse to sell products to the plaintiff, or to only sell products at discriminatory prices with highly unfavorable terms. These agreements seriously handicapped the plaintiff's ability to compete, and resulted in significant loss of profits, goodwill, reputation, and prestige for the plaintiff. 359 U.S. at 208. Although the plaintiff was not able to demonstrate that his exclusion from the market would cause a significant impact on the availability of products to consumers, this Court was persuaded that the plaintiff had demonstrated a clear and apparent anticompetitive effect with no redeeming virtue. Applying a per se analysis, this Court held that the boycott of the plaintiff by many of the major manufacturers and distributors in the affected industry violated the antitrust laws. *Id.* at 213.

In *United States v. General Motors Corp.*, the challenged activity was a mandate imposed by General Motors (as the result of complaints by several competing General Motors dealers) precluding dealers from selling cars to discount houses. The United States demonstrated that the participation of General Motors, which controlled the supply of cars to the dealers, combined with the vigilant enforcement efforts of competing dealers, effectively ended the practice of selling cars to discount houses for resale to consumers in the Los Angeles area. 384 U.S. at 135-138. This Court held that the government had demonstrated the requisite collusive activity and clear anticompetitive effect required for per se treatment of a Section One Sherman Act claim. *Id.* at 145.

In *Superior Court Trial Lawyers Association*, the F.T.C. was able to demonstrate that members of the defendant association had collusively agreed not to take on additional court-appointed cases unless the government increased the fees for court appointed attorneys. The Association's efforts proved successful, as the system essentially shut down when the boycott went into effect, and the government was persuaded to increase the fees. 493 U.S. at 417-418. Having demonstrated the clear anticompetitive effect of the collusive group effort, this Court held that there was no special exemption from per se treatment where the intended efforts of the defendants were to provoke legislative action. This Court therefore utilized a per se analysis in ruling that the boycott was a violation of the antitrust laws. *Id.* at 430-31.

Unlike the circumstances in *Superior Court Trial Lawyers Association*, the Petitioner's case is not one in which the victim of the boycott is a buyer of the allegedly colluding defendants. Instead, the Petitioner's only plausible horizontal claim in this case is premised on an alleged conspiracy involving agreement among CFMA members to "boycott" not a buyer from or seller to those competitors, but simply another competitor, the Petitioner.

Nor is the Petitioner's case similar to the circumstances in *FTC v. Indiana Federation of Dentists*. In that case, the alleged horizontal boycott involved an agreement among competing dentists to withhold patient x-rays from insurance companies that requested them in reviewing dentists' services for reimbursement. 476 U.S. at 451. Thus, once again, the intended victims of the horizontal boycott were the customers of the conspirators, not a fellow competitor.[1]

In *Associated Press, Klor's Inc.*, and *United States v. General Motors*, this Court applied the per se approach where the alleged collusive action by competitors was to disadvantage one or more of their direct competitors, either by directly denying, or persuading or coercing suppliers or customers to deny, relationships the competitors needed in the competitive struggle. *See also, Northwest Wholesale Stationers*, 472 U.S. at 294. But the Petitioner in this case has produced no evidence of any such coercion by CFMA or its members, or the denial of relationships necessary for the Petitioner to compete for patients in the Orlando area. Thus, the holdings of *Associated Press, Klor's Inc.* and *United States v. General Motors* are inapposite to the Petitioner's case.[2]

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1. It is interesting to note that the Court in *F.T.C. v. Indiana Federation of Dentists* applied a rule of reason rather than a per se analysis to the group boycott claims, despite the uncontested fact that a large group of competing dentists conspired with one another to withhold x-rays from insurance companies seeking to determine appropriate levels of reimbursement for dental services. *Id.* 458-59. The Court did, however, rule that the F.T.C. was not required to conduct a detailed market analysis to support its antitrust claims under the rule of reason analysis because significant anticompetitive effect had been established, and no compelling procompetitive justification for the boycott had been offered by the defendants. *Id.* 460-61; 463-64.

2. Similarly, despite the Petitioner's claims to the contrary, there is no conflict among the circuit courts in the invocation of the per se rule. In *Denny's*

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C. Petitioner Failed to Demonstrate a Clear Anticompetitive Effect With No Redeeming Virtue — A Prerequisite for Invocation of the Per Se Rule.

As the Eleventh Circuit noted, Dr. Levine failed to demonstrate that Health*choice* and CFMA have the requisite market power that would allow them to deny relationships necessary for the Petitioner to compete in the Orlando area. *Levine*, 72 F.3d at 1550. Health*choice* patients are free to use non-Health*choice* physicians, limited only by higher deductible payments established by the Payors, not by Health*choice* or CFMA and its members. *Id.* at 1547. Health*choice* patients are also provided with options regarding their health plans, and are

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Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217 (7th Cir. 1993), the plaintiff demonstrated that because of his price cutting efforts, his competitors colluded with the operators of the major boat shows in Indiana to exclude the plaintiff from participating, significantly impacting the plaintiff's ability to compete. *Id.* at 1219-1220. Although the Court elected not to perform a "quick look" into the potential effect of the restraint on the relevant market, it based its decision to afford per se treatment to the plaintiff's claims on the undisputed fact that the boycott was a retaliatory effort by other boat dealers against a price cutting competitor, and no procompetitive justification was offered by the defendants to explain their behavior.

The Petitioner also cites to *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994), as an alleged use of per se treatment for a group boycott case. The only reference to per se treatment in that case, however, is a discussion of the availability of per se treatment for Section One violations, and the lack of per se treatment for Section Two cases. *Id.* at 1000. Nowhere in the opinion (which reversed an award of summary judgment to the defendants based upon a determination that a sufficient factual question of collusive behavior existed) does the Third Circuit require that the alleged conspiracy by retail wallpaper stores and wallpaper manufacturers against discount wallpaper dealers be afforded per se treatment upon remand.

free to switch to other plans if they are dissatisfied with the Health*choice* program. *Id.* at 1552-53. Thus, even if the Petitioner had presented any evidence of an agreement between Health*choice* and CFMA members to exclude the Petitioner from the Health*choice* panel, that agreement would most properly have been analyzed under a rule of reason approach due to the lack of apparent anticompetitive effect.

The Respondents also demonstrated significant "redeeming virtue" associated with closed-panel PPOs and HMOs. Managed care organizations, which are relatively new to the healthcare market, have overtaken traditional comprehensive insurance coverage as the health care plan of choice. Such organizations accounted for 69% of potential patients in the Orlando area at the time summary judgment was awarded by the District court. [R3-80, ¶18; R6-147. pg. 17.] There also is vigorous competition in the Orlando area for comprehensive healthcare coverage, with no one organization covering more than 7.5% of the population. [R3-80, ¶18.] The procompetitive benefits of PPOs have been widely acknowledged. [R3-49, ¶¶7, 10.] Further, as the Eleventh Circuit noted, the Department of Justice ("DOJ") enforcement policy has recognized that selective contracting by PPOs and providers may be a method by which the PPOs achieve quality and cost containment goals that enhance their ability to compete in the market. DOJ Enforcement Policy at 42.[3]

The Petitioner has conspicuously failed to identify a single instance in which the exclusion of a physician from panel participation in a managed care organization was analyzed under the per se approach. In fact, every antitrust case involving membership in a managed care organization that the undersigned

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3. The DOJ therefore requires a rule of reason rather than a per se analysis of potential antitrust violations. DOJ Enforcement Policy at 42. Additionally, the State of Florida has authorized the utilization of closed panels by PPOs. Section 627.6471, Fla. Stat.

counsel was able to find was analyzed under the rule of reason approach. *Doctors Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 897 F. Supp. 290 (E.D. La. 1995); *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.*, 791 F. Supp. 956 (N.D.N.Y. 1992), *aff'd*, 996 F.2d 537 (2d Cir. 1992), *cert. denied*, 510 U.S. 947, 114 S. Ct. 388, 125 L. Ed. 2d 337 (1993); *Williamson v. Sacred Heart Hospital of Pensacola*, 1993 WL 543002 (N.D. Fla. 1993), *aff'd*, 41 F.3d 667 (1994), *cert. denied*, __ U.S. __, 115 S. Ct. 2556, 132 L. Ed. 2d 810 (1995); *Hassan v. Independent Practice Associates, Inc.*, 698 F. Supp. 679 (E.D. Mich. 1988); *Northwest Medical Laboratories, Inc. v. Blue Cross Blue Shield of Oregon*, 775 P.2d 863 (Or. Ct. App. 1989), *aff'd*, 794 P.2d 428 (Or. 1990).

Further support for a rule of reason approach in the context of physician "privileges" is found in this Court's opinion in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984). In that case, this Court refused to utilize a per se analysis in evaluating the antitrust claims of a physician who was denied staff privileges at a hospital. *Id.* at 15-16. Yet, denial of access to a hospital with a 30% market share (*Id.* at 426) has far more potential for anticompetitive effects than denial of a single competitor's application for membership in a PPO with less than 6% of the available patients in the Orlando area.

The record below indicates that the Petitioner failed to establish that Health*choice*'s utilization of a closed panel had any apparent anticompetitive effect on the market for medical services with no redeeming value. Based upon that record, the Eleventh Circuit properly followed established precedent in rejecting the Petitioner's assertion that the Respondents' alleged "group boycott" activities should be evaluated under the per se approach. There was accordingly no error in the Eleventh Circuit's treatment of antitrust precedent, nor its ruling.

D. Summary Judgment Was Properly Awarded to the Respondents With Regard to Petitioner's Group Boycott Claims.

Under the guidelines established by this Court in *Matsushita*, the Petitioner could not withstand the Respondents' motions for summary judgment merely by alleging the existence of a horizontal group boycott. He was required to present some evidence that CFMA or its members controlled the decision by Health*choice* to utilize a closed panel, or that the utilization of a closed panel had a clear and apparent anticompetitive effect. This is especially true in light of the numerous procompetitive reasons for utilization of a closed panel offered by the Respondents in their motions for summary judgment. 475 U.S. at 588.

Viewing the evidence, facts, and inferences in the light most favorable to the Petitioner, both the District court and the Eleventh Circuit determined that he failed to establish an alleged horizontal group boycott with a clear and apparent anticompetitive effect that would require per se treatment under the antitrust laws. Having failed to meet his burden in the District court, the Petitioner's request for certiorari should be denied.

II.

THE PETITIONER FAILED TO PROVIDE ANY EVIDENCE OF AN AGREEMENT TO FIX PRICES.

A. The Petitioner Failed to Present Evidence of Collusive Behavior Necessary to Establish a Price-Fixing Conspiracy Under Section One of the Sherman Act.

The Petitioner asserts that the utilization of a Master Payor Rate Schedule constitutes an illegal conspiracy to fix prices for

which per se treatment is mandated. Through his phrasing of the question presented to this Court, the Petitioner seems to imply that there was some question in the Eleventh Circuit's analysis of his claim as to whether the claim should be analyzed under a rule of reason or per se approach. This was not, in fact, an issue addressed by the Eleventh Circuit. The basis for the Eleventh Circuit's decision to uphold the award of summary judgment to the Respondents on the price-fixing claim was clearly and succinctly stated:

> Because there is no genuine issue of material fact regarding the existence of an agreement among Health*choice*, CFMA, or its member doctors to fix provider fees, and because defendants are entitled to judgment as a matter of law, Dr. Levine's section 1 claim against these defendants, to the extent that it alleges illegal price fixing, fails.

Levine, 72 F.3d at 1548.

In addition to his confusing references to per se treatment, the Petitioner misleads this Court by substituting CFMA for Health*choice* when discussing the establishment and negotiation of fees with Health*choice* Payors. The record is, however, devoid of any evidence supporting the Petitioner's contention that CFMA or any of its members have any involvement in establishing the Master Payor Rate Schedule, or negotiating the maximum prices that individual Payors will pay for physician services. As noted by the Eleventh Circuit:

> Although Dr. Levine did not specifically argue to this Court that the Defendants illegally fixed prices, *i.e.* provider fees, there are portions of his brief where he appears to

> assume the existence of such an agreement. That assumption is contrary to the uncontroverted evidence in the record, which establishes that there was no agreement between Health*choice*, CFMA, and their member physicians to fix provider fees. Health*choice* negotiates the provider reimbursement schedule directly with the payors, not with providers. Health*choice* does not consult any physician providers when it compiles the CPT code unit values or the Master Payor Rate Schedule, and physician members of the Health*choice* board of directors are excluded from the reimbursement schedule proposal and approval process. Providers must either accept not more than the maximum reimbursement negotiated by Health*choice* with the payors and not charge the patient for any difference between their fee and the reimbursement, or else opt out.

Levine, 72 F.3d at 1548.

The Petitioner relies heavily on this Court's decision in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982), in support of his contention that the Eleventh Circuit erred in upholding summary judgment on the Petitioner's price-fixing claims. The Petitioner, however, ignores a significant distinction between the facts presented to this Court in *Maricopa County Medical Society* and the facts presented to the District and Circuit courts in this case.

In *Maricopa County Medical Society*, the evidence clearly established that the medical society which established the

maximum fee schedule was controlled by its physician members, and that the maximum fee schedule was established by majority vote of the physicians. 457 U.S. at 340-341. This contrasts significantly with the facts in this case. Here, it is undisputed that Health*choice* establishes the maximum allowable fee schedule and negotiates the provider reimbursement schedule directly with individual Payors. Fees are established and negotiated without any involvement of or participation from CFMA, including the CFMA members on the Health*choice* board of directors. *Levine*, 72 F.3d at 1548.

This Court indicated in footnote 26 in *Maricopa County Medical Society* that it was not condemning arrangements in which physicians, through bilateral contracts, agreed to a maximum fee schedule set by someone other than the physicians. 457 U.S. at 352. It further noted that the United States, in an amicus curiae brief, believed that such arrangement in which the maximum fees were set by an insurer would be legal, absent evidence of a conspiracy by the providers. *Id.* Shortly thereafter, analogous situations were addressed in two Circuit court cases. Both Circuit courts found that no antitrust violation had occurred, and this Court denied petitions for certiorari in both instances. *Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pennsylvania*, 745 F.2d 248 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016, 105 S. Ct. 2021, 85 L. Ed. 2d 303 (1985); *Kartell v. Blue Shield*, 749 F.2d 922, 923-26 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029, 105 S. Ct. 2040, 85 L. Ed. 2d 322 (1985).

The facts of *Pennsylvania Dental Association* are strikingly similar to those in this case. The defendant, Blue Shield, entered into bilateral contracts with dentists that required the dentists to accept the maximum fee determined by Blue Shield as payment in full for services provided to patients covered by Blue Shield plans. 745 F.2d at 253. Like Health*choice*, one-half of the board

of directors of Blue Shield was comprised of physicians and dentists who provided services to Blue Shield customers. *Id.* However, unlike Health*choice*, Blue Shield did not exclude its physician and dentist board members from participation in the establishment of fees to be paid to physicians and dentists. *Id.* at 253-254.

Despite the involvement of physician and dentist board members in pricing decisions, the Third Circuit found no price-fixing conspiracy among the defendants due to the lack of any evidence that the dentists or physicians controlled the pricing policies of Blue Shield. The Third Circuit reasoned that in the absence of any evidence of collusive behavior among dentists that affected Blue Shield's payments, there could be no Section One violation. Blue Shield was therefore not precluded by the antitrust laws from establishing a maximum fee policy, or from having physicians and dentists agree in advance to abide by that policy. *Id.* at 256.

The Third Circuit noted that under the controlling precedent of *Maricopa County Medical Society*, if the plaintiffs had established that the pricing structure utilized by Blue Shield was controlled by the competing physicians and dentists, the maximum fee structure could be considered a price-fixing conspiracy. *Id.* at 257. Other Circuit courts had found potential antitrust violations where control by competing physicians had been established. *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980); *Glen Eden Hospital, Inc. v. Blue Cross & Blue Shield of Michigan*, 740 F.2d 423 (6th Cir. 1984).

Despite ample opportunity through discovery to establish any evidence of physician control over pricing policies, the plaintiffs in *Pennsylvania Dental Association* were unable to present any such evidence. *Id.* at 257. Similarly, the Petitioner in

this action, despite receiving an extension of time from the District court to complete discovery and supplement his response to the Respondents' summary judgment motions [R3-92; R4-117], was unable to provide any evidence that CFMA or its physician members had any control over the maximum fees for physician services established by Health*choice* and the individual payors.

In *Kartell*, the First Circuit, in an opinion by Justice Breyer, used reasoning similar to that of the Third Circuit in *Pennsylvania Dental Association* in rejecting a price-fixing challenge to a maximum fee structure. The defendant, Blue Shield, required physicians seeking reimbursement for services provided to Blue Shield enrollees to execute contracts which required acceptance of Blue Shield's "usual and customary charge" as payment in full. With no evidence of control of the fee schedule by the participating physicians, the First Circuit held that the bilateral contracts between Blue Shield and numerous competing physicians did not amount to collusive behavior necessary to establish a price-fixing claim, despite the fact that the bilateral contracts tended to make fees paid to the competing physicians uniform. *Kartell*, 749 F.2d at 925.

Proof of collusive behavior is essential to any Section One claim. *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752, 767-69, 104 S. Ct. 2731, 2739-41, 81 L. Ed. 2d 628 (1984). A conspiracy, combination, or agreement in violation of the antitrust laws cannot be inferred unless the Petitioner presents evidence that tends to exclude the possibility of independent action by the alleged conspirators. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984). Execution of bilateral contracts between Health*choice* and CFMA members, under which CFMA members agreed to accept the maximum fees negotiated between

Health*choice* and Payors as payment in full for service rendered to Health*choice* patients, without any evidence that CFMA members controlled Health*choice*, or colluded among themselves to fix prices, cannot be the basis for inferring collusive behavior necessary for a price-fixing claim. The Eleventh Circuit therefore properly upheld the grant of summary judgment to the Respondents.

B. The Petitioner Lacks Standing to Pursue a Section One Price-Fixing Claim Against the Respondents.

In upholding the grant of summary judgment to the Respondents on the Petitioner's Section One price-fixing claim based upon the absence of evidence of collusion, the Eleventh Circuit consciously elected not to address the issue of the Petitioner's standing to pursue this claim. *Levine*, 72 F.3d at 1545. Assuming, arguendo, that the Petitioner had been able to offer any evidence of collusive behavior of participating physicians in establishing the maximum fees to be charged by Health*choice* providers, the District court's grant of summary judgment to the Respondents was still proper due to Petitioner's lack of standing to pursue his antitrust claims. CFMA's successful challenge to the Petitioner's standing to pursue his antitrust claims is not, as the Petitioner suggests, meritless, nor has CFMA abandoned its challenge.

To establish standing to pursue an antitrust claim, the Petitioner was required to demonstrate each of the following requirements: (1) that he suffered some injury as a result of the alleged anticompetitive action; (2) that his alleged injuries coincide with the public detriment tending to result from the alleged anticompetitive action; and (3) that he is an efficient enforcer of the antitrust laws. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537, 542, 103 S. Ct. 897, 908, 910-11, 74 L. Ed. 2d 723

(1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d. 701 (1970); *Cargill Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111, 107 S. Ct. 484, 490, 93 L. Ed. 2d 427 (1986). The Petitioner has failed to provide any evidence demonstrating that he can meet any of the three requirements.

The undisputed evidence on record establishes that the Petitioner's practice has expanded and prospered, despite the alleged existence of a price-fixing conspiracy among CFMA members and others. *Levine*, 72 F.3d at 1551. As the Eleventh Circuit noted, the Petitioner failed to produce any evidence that the Petitioner lost a single patient as a result of the alleged conspiracy to limit the Petitioner's access to patients or control prices in the Orlando market for healthcare services. *Id.* at 1552-53. Further, there is nothing in the record that indicates that the Petitioner was prevented from directly contracting with Payors to provide services to their enrollees at any price to which the Petitioner and the Payors could agree. Thus, as the district court found in granting summary judgment to the Respondents, Petitioner suffered no perceivable injury as a result of the alleged anticompetitive activities.

The district court also found that the Petitioner did not suffer injuries that coincide with the public detriment tending to result from the alleged anticompetitive actions of the Respondents. [R6-147, pp. 15-16.] As the Eleventh Circuit noted, no evidence was presented demonstrating that the maximum fee schedule established by Health*choice* artificially inflated the fees of Health*choice* providers over non-Health*choice* providers. *Levine*, 72 F.3d at 1552. Indeed, the Petitioner presented no evidence that prices charged to Payors for services of Health*choice* panel members had any effect on prices outside of the Health*choice* network.

Even if, contrary to the record, higher provider prices to Health*choice* Payors had resulted from the Respondents' actions, the Petitioner still would have suffered no injury. Any higher in-network prices would increase the Petitioner's ability to compete for Health*choice* enrollees, by reducing the impact to Petitioner of waiving deductible and co-payment requirement imposed on Health*choice* enrollees by the Payors. Further, if any impact to non-Health*choice* prices had been established, the likely impact from higher prices for Health*choice* physicians would be higher prices to non-Health*choice* patients. This would again fail to create any injury to the Plaintiff, as he would suffer no damage from higher prevailing prices for physician services.

As this Court discussed in *Maricopa County Medical Society*, a possible adverse effect of a maximum fee schedule that artificially lowers prices is the tendency to drive down prices outside the network, and to limit innovative but more costly methods of providing services. 457 U.S. at 347. The Petitioner, however, presented no evidence that the maximum fee schedule utilized by Health*choice* artificially deflated the prices he was able to charge his patients, or in any way interfered with the manner in which he treated patients. Thus, he has demonstrated no "antitrust injury" associated with the alleged price-fixing scheme.

As the district court noted, if the Petitioner had been able to demonstrate any injury resulting from the alleged price-fixing scheme, he still would not be an efficient enforcer of the antitrust laws. [R6-49, pg. 16.] The Petitioner is a single practitioner who, while alleging that Health*choice* and CFMA were engaging in an illegal price-fixing scheme, also seeks to join Health*choice* and CFMA so that he can obtain access to Health*choice* patients. The only "injury" that would be redressed by permitting the Petitioner to join the Health*choice* panel is potential loss of market share or foregone extra profits. Injury to a single

competitor, rather than to competition, is not the kind of injury the antitrust laws were intended to forestall. *Brunswick Corp.*, 429 U.S. at 487-88. This is especially true in the present case, where the Petitioner is already earning substantially more than the average internist in the Orlando area. *Levine*, 72 F.3d at 1551.

CONCLUSION

As noted above, the Eleventh Circuit followed controlling precedent in its analysis of the Petitioner's claims, and found no antitrust violation due to the absence of any record evidence demonstrating collusive behavior among competitors, anticompetitive effect in any market, or antitrust injury suffered by the Petitioner. The Supreme Court and circuit court cases cited by the Petitioner in his request for "GVR" treatment of the Eleventh Circuit opinion, many of which were not cited by the Petitioner in his briefs to the district court or the Eleventh Circuit, are not inconsistent with the Eleventh Circuit opinion. In each of those cases, the plaintiffs presented evidence of anticompetitive activity leading to anticompetitive effects — a necessity to withstand a motion for summary judgment. Put plainly and simply, this Petitioner has not, despite ample opportunity to do so.

Thus, even if this Court desires to consider the antitrust implications of maximum fee schedules and closed panels in the managed healthcare field, Petitioner's case, in which there was no demonstration of injury to the competitor plaintiff, let alone competition, is a poor choice for such eview. This Court should accordingly deny the Petitioner's request for certiorari review.

Respectfully submitted,

RONALD M. SCHIRTZER
Counsel of Record
ROBERT J. ENDERS
MARK J. WAXMAN
FOLEY & LARDNER
Attorneys for Respondent
Central Florida Medical Affiliates, Inc.
111 North Orange Avenue
Suite 1800
P.O. Box 2193
Orlando, Florida 32802-2193
(407) 423-7656